56/26

FILED
JAN 16 1956
HAROLD B. WILLEY, Clerk

No. 582

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TIDEWATER ASSOCIATED OIL COMPANY, a corporation,
Petitioner,

vs.

VANCE W. WILLIAMS

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E. J. FRIEDMAN
Attorney for Respondent.

1602 Northern Life Tower
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

No. 582

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TIDEWATER ASSOCIATED OIL COMPANY, a corporation,
Petitioner,

vs.

VANCE W. WILLIAMS

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E. J. FRIEDMAN
Attorney for Respondent.

1602 Northern Life Tower
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement	2
Argument	2
1. There is no conflict in the decision of the court below with decisions of this court or other circuit courts of appeal	2
2. The decision of the court below is clearly correct	7
Conclusion	13

TABLE OF CASES

The Arizone v. Anelich, 298 U.S. 110 at 123	13
Balado v. Lykes Bros. Steamship Co. (2 C.C.A.) 179 F.(2d) 943	3, 4
Baltimore S. S. Co. v. Phillips, 274 U.S. 321, 71 L. Ed. 1972, 42 Sup. Ct. Rep. 600	12
Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 71 L. Ed. 1069	8, 9, 11
Boudoin v. Lykes Bros. Steamship Co., U.S.S.Ct., February 1955, A.M.C. 488, 348 U.S. 336, 99 L. Ed. 354	6
Branic v. Wheeling Steel Corporation (3 CCA) 152 F.(2d) 887, 889-890	2
Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 380, 381	13
Doucette v. Vincent, 194 F.(2d) 834	5
German v. Carnegie-Illinois Steel Co. (3 C.C.A.) 156 F.(2d) 977	2, 3
McCarthy v. American Eastern Corporation (3 C.C.A.) 175 F.(2d) 724, cert. den. 338 U.S. 868	2, 3
McGhee v. United States of America, 165 F.(2d) 287	4
Osceola, 189 U.S. 158, 47 L.Ed. 760	9

Page

Pacific S. S. Co. v. Peterson, 278 U.S. 130, 73 L.Ed. 220 11
Sanford v. Caswell, 900 F.(2d) 830 5
Skolar v. Lehigh Valley R. R. Co., 60 F.(2d) 893 4
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 at 431 13
Thurston v. U.S. (9 C.C.A.) 179 F.(2d) 514, 517 13
U.S.A. v. Smith, adm., 220 F.(2d) 548 5

STATUTES

Title 46, U.S.C.A., Sec. 688 ..... 2, 7, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TIDEWATER ASSOCIATED OIL COMPANY, a corporation, *Petitioner*, vs. VANCE W. WILLIAMS	No. 582

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Tidewater Associated Oil Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on November 25, 1955.

OPINIONS BELOW

The opinion of the United States Court of Appeals and that of the District Court are correctly set forth in the appendix to the petition.

JURISDICTION

The jurisdiction ~~requests~~ REQUISITES are adequately set forth in the petition.

QUESTION PRESENTED

The statement of the question presented as set forth in the petition is correct.

STATUTE INVOLVED

The statutory provision involved, 46 U.S.C.A., Section 688, commonly known as the Jones Act, is correctly set forth in the petition.

STATEMENT

The statement of facts and the manner in which the question arose is adequately and correctly set forth in the petition.

ARGUMENT

I. There Is No Conflict in the Decision of the Court Below with Decisions of This Court or Other Circuit Courts of Appeal.

In all cases where the question has been presented to the circuit courts, the decisions have been uniform and the same as that of the court below.

Respondent's claim derives from two sources, the Jones Act, 46 U.S.C.A., Section 688, which gives a right of action for negligence, and the General Maritime Law, which gives a right of action for unseaworthiness. *Branic v. Wheeling Steel Corporation* (3 C.C.A.) 152 F.(2d) 887, 889-890. This case was, therefore, an action under the maritime law as modified or supplemented by the Jones Act.

While the question of election has been involved in a substantial number of cases, only two circuit courts have had this issue directly before them as such and passed upon it. They are the United States Circuit Court of Appeals for the Second Circuit and the Third Circuit. They are *German v. Carnegie-Illinois Steel Co.* (3 C.C.A.) 156 F.(2d) 977; *McCarthy v. American Eastern Corporation* (3 C.C.A.) 175 F.(2d) 724, *cert.*

den., 338 U.S. 868; and *Balado v. Lykes Bros. Steamship Co.* (2 C.C.A.) 179 F.(2d) 943. Both have decided that to compel an "election" before trial between negligence under the Jones Act and unseaworthiness under the General Maritime Law constitutes prejudicial error.

When the matter was first presented to the Third Circuit in *German v. Carnegie-Illinois Steel Co.* (*supra*), the court held that the requirement by the trial court, that the plaintiff elect between a cause of action based upon negligence under the Jones Act and one upon unseaworthiness was reversible error and sent the case back for a new trial after a verdict for the defendant. The question again came before the Third Circuit in *McCarthy v. American Eastern Corporation* (*supra*). The court then had before it the validity of a verdict in favor of the plaintiff on a claim which had as its basis both the unseaworthiness of the vessel and the negligence of the crew. The basis of the appeal was the alleged error in submitting both of these issues to the jury. The Third Circuit referred to the fact that although this question had been decided adversely to the appellant on one of its prior decisions (*German v. Carnegie-Illinois Steel Co., supra*) in view of the insistent argument that its prior decision ran counter to the decisions of the Supreme Court of the United States, the court reviewed its prior case and amplified the reasons which led to its conclusion. The court discussed the arguments presented and reaffirmed its prior decision as being supported both by the decisions of this court and in accord with the traditional attitude of the courts toward the rights of seamen. A petition for a

writ of certiorari, seeking to review this situation, was filed in this court and denied (338 U.S. 868) as well as was the petition for rehearing of this court's action.

The Circuit Court of Appeals for the Second Circuit had originally used language in the cases of *Skolar v. Lehigh Valley R.R. Co.*, 60 F.(2d) 893, and *McGhee v. United States of America*, 165 F.(2d) 287, which gave support to the proposition that an election between negligence and unseaworthiness would be required. These are undoubtedly the cases upon which petitioner relies when he states that there are vacillating views of the various circuits. The Second Circuit had occasion to review both the *Skolar* and *McGhee* cases in the case of *Balado v. Lykes Bros. Steamship Co.*, 179 F.(2d) 943, and reversed its prior holdings in the *Skolar* and *McGhee* cases, *supra*. The *Balado* case was originally presented upon the theory of negligence and unseaworthiness. In the charge to the jury, however, the trial court removed the issue of unseaworthiness from the jury. The question was, therefore, squarely before the Second Circuit as to whether these two issues could be presented in the same proceeding. The circuit court held that they could and in its decision refers to its prior decisions and reverses its prior rulings. We quote from page 945 as follows:

> "The question whether the plaintiff must elect whether to claim damages under the Jones Act for negligence, or under maritime law for unseaworthiness before submitting his claims to a jury may perhaps be raised on a new trial because of certain dicta in our decisions in *Skolar v. Lehigh Valley R.R. Co.*, 60 F.(2d) 893, 894, and *McGhee v. United States*, 165 F.(2d) 287. On this matter of election of remedies we find the analysis by Judge Maris in

the opinion of the Supreme Court in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, most persuasive. In accordance with the view there expressed we think there will be no necessity for such an election in the future. In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act. On the evidence before us we can discover no proof of negligence on the part of the defendant which caused any injury to the plaintiff. If the plaintiff can sustain any claim for damages it will be found on proof that the ship was unseaworthy when she sailed, and not on negligence of the officers and crew."

While there have been no other circuit court cases which have passed upon the issue directly as presented here, all other federal circuits which have touched upon the question have assumed that an action for damages based on unseaworthiness under the maritime law and negligence under the Jones Act could be joined under the one action. Such was the case in the Fifth Circuit in *Sanford v. Caswell,* 200 F.(2d) 830; *U.S.A. v. Smith, adm.,* 220 F.(2d) 548; and the First Circuit, *Doucette v. Vincent,* 194 F.(2d) 834.

In the case of *U.S.A. v. Smith, (supra)* the opening lines of the opinion are as follows:

> "*Richard T. Reeves, Ct. J.*: This action by the administrator for the benefit of the parents and dependents of Jeff Smith, deceased, was brought under the Jones Act, 46 U.S. Code 688, as well as under the admiralty law for unseaworthiness."

This court has also adopted a similar position in the

very recent case of *Boudoin v. Lykes Bros. Steamship Co.*, U.S.S. Ct., February, 1955, A.M.C. 488, 348 U.S. 336, 99 L.Ed. 354. Respondent frankly admits that the issue as presented here was not involved in that case. That case, however, assumes as did the Circuit Court of Appeals for the First and Fifth Circuits that a cause of action based on unseaworthiness and on negligence could be joined. We base this assumption upon the fact that no criticism or comment is made of such joinder. We quote the following opening portion of the opinion:

> "Mr. Justice Douglas delivered the opinion of the court:
>
> " 'This is a suit by an American seaman against the owner and operator of an ocean freighter, the *Mason Lykes,* upon which he was formerly employed. He based his claim for recovery both on negligence and on breach of the warranty of seaworthiness. The case was tried by the court upon waiver of jury. The district court found for the plaintiff, holding that the ship owner breached its warranty of seaworthiness and that its officers were negligent'."

The Supreme Court in reversing the Circuit Court and affirming the opinion of the District Court found that there was sufficient evidence to support a cause of action for the breach of warranty of seaworthiness. Therefore, it was not necessary for them to reach the question of negligence. However, Mr. Justice Reed concurred in the result on the ground of the negligence of the ship's officers.

There are a few early district court cases and some in the state courts which hold a contrary opinion. However, subsequent and present decisions from these dis-

tricts and states are now in accord with the decisions of the federal appellate courts. They are referred to in the notes of the opinion of the court below.

There is no present conflict in the federal courts on this issue.

II. The Decision of the Court Below Is Clearly Correct.

Petitioner has asserted and was originally sustained by the district court that the phrase "at his election" as used in the Jones Act, 46 U.S. Code 688, requires the seaman to elect between theories of liability, that is to say, that it requires the seaman to choose whether he will assert liability under the theory of unseaworthiness under the old rules or under the theory of negligence under the new rules; that this statute forecloses the assertion of liability upon both grounds in the same action. This proposition on its face appears to be so unreasonable as to make it improbable.

What then is the election contemplated by the Jones Act? One aspect is readily considered, namely the seaman's freedom of choice to proceed in admiralty, *in rem* if desired, rather than at law. But there is a second aspect to the problem.

While the Jones Act created and incorporated into the maritime law new rules of liability for injuries resulting from negligence, it did not create a new *cause of action* with respect to such injuries. In other words, recovery of damages based upon negligence was not intended to be cumulative to recovery in damages based upon unseaworthiness. Congress was simply providing an additional basis of liability upon which a single recovery of damages could be predicated. The operative

facts, whether constituting unseaworthiness or negligence, or both combined, are common to both and *constitute but a single legal wrong resulting in a single cause of action.* This, in plain terms, means that a seaman is foreclosed from prosecuting from a judgment on the merits, two actions based upon the same legal wrong, one on the theory of negligence and the other on the theory of unseaworthiness. If the seaman chooses to proceed to judgment on any single theory of liability, he may not thereafter proceed again on another theory since his *single cause of action* once litigated on whatever theory is extinguished at the moment of judgment.

The foregoing is consonant with the established principles of *res judicata. Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L.Ed. 1069. An examination of the *Phillips* case served to demonstrate that, precisely for this reason, a seaman cannot adequately enforce his rights under the maritime law unless he proceeds as the plaintiff here attempted to proceed. That is to say, unless he asserts *in the same action* all of the grounds upon which he expects a judgment in his favor. In that case the seaman had prosecuted to judgment (the judgment being adverse to the seaman) a libel in admiralty against a vessel owner for damages resulting from personal injuries allegedly caused:

> "by negligence in failing to provide a safe place in which to work and to use reasonable care to avoid striking respondent, and by unseaworthiness and insufficiency of gear and tackle employed on the vessel." (274 U.S. p. 318)

Thereafter he brought a second action to recover

damages for the same injury, based upon the negligent operation of the same appliances by the ship's crew. The Supreme Court held that the judgment on the merits of the first case operated as an absolute bar between the same parties since the second suit was upon the same cause of action as the first one. The court stated as follows:

> (U.S. p. 319) "The affect of a judgment or decree as *res adjudicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree on the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also *as to every ground of recovery which might have been presented* * * *."
>
> (U.S. p. 320) *"He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."* (Italics supplied)

The Supreme Court pointed out that the first *Phillips* case was tried under the rule of the *Osceola,* 189 U.S. 158, 47 L.Ed. 760, that is, under the theory of unseaworthiness alone, and that the court and counsel had misinterpreted the effect of the Jones Act in that case and apparently believed that a cause of action for negligence could not be maintained. The *Phillips* case is direct authority on the precise question before this court. We quote from the court's opinion as follows:

(U.S. p. 324) "It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery *open to respondent in the second case, was equally open to him in the first.* But evidently in the first proceeding *both court and counsel* misinterpreted the effect of Sec. 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in the *Osceola,* 189 U.S. 158, 175: 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negilgence or accident,' was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would have been sought and allowed, pleading the ground of negligence afterwards set up in the second action. *Nevertheless, the cause of action was one and indivisible* and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata.* Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not." (Italics supplied)

It follows, therefore, that if the seaman recovers damages under the old rules on the ground that his injuries were occasioned by unseaworthiness he may not thereafter recover damages under the new rules on the ground that his injuries were caused by negligence.

This does not mean that he cannot proceed on both grounds in the same action, for no matter whether the injuries were occasioned by unseaworthiness or by neg-

ligence, or both combined, there is but a single legal wrong for which he will recover one indemnity by way of compensatory damages. The crux of the matter is that plaintiff's right to assert both grounds of liability at law does not stem exclusively from the Jones Act. It derives primarily from the principles reviewed in the *Phillips* case, *supra,* considered in conjunction with the rules, that liability for unseaworthiness may be asserted on the law side of the court without encroachment upon the admiralty jurisdiction.

At the time of the passage of the Jones Act it was the established doctrine that liability for unseaworthiness was enforceable on the law side of the court. Consistent with the principles reviewed in the *Phillips* case, *supra,* Congress in creating the new rules of liability for the benefit of seamen simply supplemented the existing maritime law by providing that in such action all of the prescribed railway acts shall apply. By this provision, the new rules were incorporated into and became an integral part of the maritime law, and by it, the seaman was left free to avail himself of the old rules of liability as well as the new, *provided both are asserted in the same action.*

Petitioner relies heavily on the language of *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220, and quotes a portion of that opinion in support of his position. We direct the court's attention to the following language in the same opinion which recognizes that whether the cause of action be based on unseaworthiness or negligence there is but a single invasion of his primary right of bodily safety:

" * * * Unseaworthiness, as is well understood,

embraces certain species of negligence; while the statute includes several additional species not embraced in that term. *But whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong* (*Baltimore S.S. Co. v. Phillips*, 274 U.S. 321, 71 L.Ed. 1972, 42 Sup. Ct. Rep. 600) *for which he is entitled to but one indemnity by way of compensatory damages.*" (Italics supplied)

Under the foregoing it is evident that where the operative facts constituting the seaman's cause of action for damages tend to establish both negligence and unseaworthiness, the seaman is not merely privileged but bound by both bases of liability unless he wishes to run the risk of being deprived of relief altogether. It is seldom possible to predict in advance whether the proofs adduced at trial will sustain one or other basis of liability, and it is never possible to foretell which the jury will adopt and which it might reject. To impose upon the seaman the type of "election" contended for by the petitioner, and ordered by the trial court, would be to force upon the seaman a rule which is supported neither in logic, in reason, nor in policy, and which would seriously hamper the enforcement of a seaman's rights.

To read the act in the manner contended for by the petitioner would be not merely to construe narrowly a species of legislation remedial in character, intended for the benefit and protection of seamen who are peculiarly the wards of admiralty, but to do violence to legislation whose provisions are calculated to enlarge and

not to narrow the rights afforded to seamen. Such remedial legislation is always to be construed liberally. *The Arizona v. Anelich*, 298 U.S. 110 at 123; *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 at 431; *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 380, 381; *Thurston v. U.S.* (9 C.CA.) 179 F.(2d) 514, 517.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

E. J. FRIEDMAN
Attorney for Respondent.